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EXAMINER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANETTE BUSCHKA, PETER BLOMSTROM,
and TOMAS BILIGREN

Appeal 2008-1467
Application 09/870,517
Technology Center 1700

Decided: October 29, 2008

Before EDWARD C. KIMLIN, BRADLEY R. GARRIS, and
KAREN M. HASTINGS, *Administrative Patent Judges*.

HASTINGS, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellants, pursuant to 37 C.F.R. § 41.52, have submitted a timely Request for Rehearing dated July 7, 2008 (hereafter the “Request”), requesting rehearing from, and modification of, the original Decision in this appeal dated May 6, 2008 (hereafter “Dec.”) where this merits panel affirmed the Examiner's rejection of claims 1-32 under 35 U.S.C. § 103(a) as unpatentable over Matsumura in view of Ruffo and Fehrer, as well as the

Examiner's rejection of claims 33-36 over the combined teachings of Matsumura, Ruffo, Fehrer, and Rosseland (Dec. 15).

Appellants request modification based upon our reliance on the holding in *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727 (2007) since all written Briefs were submitted before the *KSR* decision (Request 1). However, the holding of *KSR* relied upon in the Decision (Dec. 8) is not unique to *KSR* but actually relies on *Graham v. John Deere*, 383 U.S. 1, 17-18 (1966), and other earlier decisions¹. This point is also well illustrated by Appellants' new arguments based upon *United States v. Adams*, 383 U.S. 39 (1966) (Request 5-6), as this case was also discussed in *KSR*. Therefore, we determine that the mere citation of a later decision that repeated earlier precedent known to Appellants does not deny the procedural due process required in accordance with 37 C.F.R. § 41.50(b).

Accordingly, our affirmance is based only on the arguments made in the Brief(s). Any arguments or authorities omitted therefrom (e.g., *United States v. Adams*) are neither before us nor at issue but are considered waived.

¹ See, e.g., *DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1361 (Fed. Cir. 2006) ("The motivation need not be found in the references sought to be combined, but may be found in any number of sources, including common knowledge, the prior art as a whole, or the nature of the problem itself."); *In re Bozek*, 416 F.2d 1385, 1390 (CCPA 1969) ("Having established that this knowledge was in the art, the examiner could then properly rely, as put forth by the solicitor, on a conclusion of obviousness 'from common knowledge and common sense of the person of ordinary skill in the art without any specific hint or suggestion in a particular reference.'"); and *In re Hoeschele*, 406 F.2d 1403, 1406-07 (CCPA 1969) ("[I]t is proper to take into account not only specific teachings of the references but also the inferences which one skilled in the art would reasonably be expected to draw therefrom ...").

Cf. In re Watts, 354 F.3d 1362, 1367 (Fed. Cir. 2004) (“[I]t is important that the applicant challenging a decision not be permitted to raise arguments on appeal that were not presented to the Board.”).

Notwithstanding the above, on the substance of the Appellants’ position, we find there to be no merit. Appellants specifically challenge the Board’s finding that:

[U]sing an air-doffing apparatus card achieves the predictable result of making a uniform non-woven web and [was] a known alternative way of forming a non-woven web versus air laying a carded web using a lickerin roll as taught in Matsumura. Appellants have not shown that there is no more than a predictable result flowing from forming the non-woven gauze with an air-doffing apparatus card versus with the process using a lickerin roll set forth in Matsumura.

(Request 2; Dec. 8).

Appellants contend that obtaining an improvement in properties is very difficult and unpredictable in this art, and that Matsumura teaches away from the claimed invention since Matsumura teaches that a rayon carding method aligns most of the fibers in the machine direction resulting in very low strength in the cross machine direction (Request 2-3).

We do not agree that Matsumura teaches away from the claimed invention. A reference may be relied upon for all that it would have reasonably suggested to one having ordinary skill in the art. *See Merck & Co v. Biocraft Labs.*, 874 F.2d 804, 807 (Fed. Cir. 1989) (“the fact that a specific [embodiment] is taught to be preferred is not controlling, since all disclosures of the prior art, including unpreferred embodiments, must be considered”). Further, Fehrer is relied upon to teach that using an air-doffing apparatus card to make a *uniform* non-woven web is known (col. 2,

ll. 10-15; Dec. 4). Thus, carding using an air-doffing apparatus card as in Fehrer results in a uniform distribution of fibers (see, e.g., Dec. 7-8), which one of ordinary skill in the art would have appreciated would have led to less machine direction alignment of the fibers than the “100% rayon carding type” method discussed in Matsumura (Matsumura col. 1, ll. 18-25).

In any event, one of ordinary skill in the art would have also readily appreciated the advantages and disadvantages of each known method of air laying fibers. Indeed, during oral hearing, Appellants’ representative admitted that one of ordinary skill in the art would have realized the advantages and disadvantages of using either of the two known ways of orientating the fibers (Oral Hearing Transcript 6:20-25).

To the extent Appellants are now relying on “unexpected results” (Request 4), we decline to so consider these new arguments. An assertion of unpredictable results is akin to an assertion of unexpected results and must be supported by evidence. *See In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (“[I]t is well settled that unexpected results must be established by factual evidence. ‘Mere argument or conclusory statements in the specification does not suffice.’”). As pointed out in our decision, Appellants did not rely on any evidence of secondary considerations of nonobviousness, such as unexpected results (Dec. 5).

In any event, it is axiomatic that the burden of demonstrating unexpected results that are commensurate in scope with the claimed subject matter rests on the party asserting them. *In re Klosak*, 455 F.2d 1077, 1080 (CCPA 1972). *See also In re Merck & Co.*, 800 F.2d 1091, 1099 (Fed. Cir. 1986).

Appellants have not met this burden. Appellants state that the claimed invention “surprisingly allows an absorbent material to be made with a higher than normal percentage of long fibers”, “surprisingly allows much greater integration of the long fibers with the cellulose fibers” (Request 4), and that the combination works together in “an unexpected manner” (Request 5). However, these comments are mere attorney argument and cannot take the place of evidence. *In re Greenfield*, 571 F.2d 1185, 1189 (CCPA 1978).

Further, to the extent Appellants argue that it is unexpected that bonding is not required, this is unpersuasive since the claim language permits the use of a mechanical bonding technique, as well as “a bonding agent”, as we explained in our Decision (Dec. 9-11).

For the foregoing reasons, we have considered Appellants’ Request for Rehearing but find no points misapprehended or overlooked in our original Decision. Therefore, Appellants’ Request for Rehearing is DENIED.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

REHEARING DENIED

Appeal 2008-1467
Application 09/870,517

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